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ABSTRACT

The Reagan Administration's allegiance lies with the advocates of individual rights, not the protectors of group entitlements. This stand is based on the belief that defense of individual rights is the only appropriate basis for achieving a consensus on civil rights in a pluralistic society. Group preferences, which have been imposed by the Federal bureaucracy, have led to bitterness and disharmony. During the past term of the Supreme Court, the rights of individuals began to regain the constitutional recognition they once enjoyed, and group entitlements were effectively relegated to the sidelines. (GC)

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REMARKS

OF

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BEFORE

THE

CHAMBER OF COMMERCE
OF THE UNITED STATES OF AMERICA
NATIONAL CHAMBER LITIGATION CENTER'S FORUM
LUNCHEON SERIES

U. S. CHAMBER OF COMMERCE BUILDING
1615 H Street, N.W.
WASHINGTON, D.C.
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1:00 P.M.

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It is a distinct pleasure to appear before this audience this afternoon to discuss some of the recent decisions by the Supreme Court in the civil rights area and what, as I see it, those decisions bode for the future. The Chamber of Commerce Litigation Center's Forum is a particularly appropriate place for airing this topic and engaging in an interchange of views on legal developments in the civil rights area. For the Chamber has more than earned its respected reputation by standing tall for individual rights, the preservation of a free market system and protecting the integrity of our political processes. We, therefore, have much more than a commonality of interests; there is an identification of values that makes this a most comfortable and welcome occasion for me.

What I would like to do in the few minutes allotted to me is focus on the general subject of individual rights. I will leave to the economists the explication of free market values and to the political scientists the task of political analysis. As a lawyer, my framework for discussion most conveniently centers on court cases, particularly those in the field of civil rights. In this arena, few debates are more heated than the one that is currently raging over individual versus group rights.

I am sure that most of you are at least roughly familiar with this debate. On one side are those who endorse as a constitutional imperative the rights of the individual, who regard each individual as unique -- a minority of one -- to be judged on the basis of his or her ability, talent and personal worth. On the other side are those intent on elevating group interests over the rights of individuals, who believe that society's benefits should be distributed among various groups on some "rough equivalency" basis that translates most often into proportionality. By this school of thought, it is not the internal characteristics (such as industry and ability) that determine who is favored or disfavored in the selection process, but rather the external characteristics (such as the color of one's skin or the structure of one's anatomy) that serve to identify a person for membership in a preferred group.

We have kept no secret as to where this Administration's allegiance lies -- it is with the advocates of individual rights, not the protectors of group entitlements. Our stand is grounded not only in fundamental teachings from our American heritage, but also in the reality that defense of individual rights is the only appropriate basis today for achieving a consensus on civil rights in a pluralistic society. Group preferences, regrettably, tend to breed only conflict and factionalism within society.

We have seen the truth of this over the past 15 years. For much of this period, group rights have been in the ascendency; goals, quotas and other numerical devices for "counting by race or sex" have been imposed through what I would call the corridors of unaccountability -- that is, the federal bureaucracy and the judiciary, primarily the lower federal courts. Predictably, this race- and gender-conscious approach to the allocation of social benefits has too often led to bitterness and disharmony, not acceptance and harmony. The economist Thomas Sowell, who has spoken out more boldly against group-oriented preferences than most others -- and has consistently made his case far better than any on the other side -- expressed the cause for concern in these terms: "There is much reason to fear the harm that [a racial preference] is doing to its supposed beneficiaries, and still more reason to fear the long-run consequences of polarizing the nation. Resentments do not accumulate indefinitely without consequences." */ The noted commentator George Will made the point more graphically when he observed, quite correctly, not too long ago that the preoccupation in the 1970's with group entitlements has operated "to divide the majestic national river into little racial and ethnic creeks," making the United States "less a nation than an angry menagerie of factions scrambling for preference. . . ."

*/ Civil Rights: Rhetoric or Reality? (New York, 1984) pp. 117-8.

Those who advocate group rights seem to have lost sight of the central point, announced some 36 years ago by the Supreme Court in Shelley v. Kraemer, 334 U.S. 1, 22 (1948), that "[t]he rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." Justice William O. Douglas found this principle to be uncompromising, noting on one occasion that: "The State . . . may not proceed by racial classification to force strict population equivalencies for every group in every population, overriding individual preferences. The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized." */ "There is," Justice Douglas concluded, "no constitutional right for any race to be preferred." **/

Congress understandably had no different view of the matter when it enacted the Civil Rights Act of 1964. Far from seeking through legislation to create throughout America pockets of preference defined by race, sex, religion or national origin, Hubert Humphrey, a central proponent of the original civil rights bill, assured his colleagues time and again that group-oriented preferences were not to be tolerated. There is nothing in Title VII of the bill, he insisted, "that will give any

*/ DeFunis v. Odegaard, 416 U.S. 321, 342 (1974), (Douglas, J., dissenting.

**/ Id. at 336.

power to the Commission or to any court to require hiring, firing or promotion of employees in order to meet a racial 'quota' or to achieve a certain racial balance. . . . That bugaboo has been brought up a dozen times; but it is nonexistent." */

That brings me, perhaps to no one's surprise, to this past Term in the Supreme Court, where the rights of individuals regained the constitutional recognition they once had enjoyed, and group entitlements were effectively relegated to the sidelines where they belong. The statement by Senator Humphrey that I just quoted was prominently repeated in the Supreme Court's decision last Term in Firefighters Local Union v. Stotts, No. 82-206 (June 12, 1984) -- a decision which, as Justice Blackmun recently noted, "interred" judicial reliance on quotas, goals, or any other kind of preferential relief based on race, sex, religion, or national origin. In Stotts, the Court did not merely hold that federal courts are prohibited from ordering racially-preferential layoffs to maintain a certain racial percentage, or that courts cannot disrupt bona fide seniority systems. To be sure, it did so rule; but the Court said much more, and in unmistakably forceful terms. As Justice Stevens remarked during his recent commencement address at

*/ 110 Cong. Rec. 6549 (1964).

Northwestern University, the decision represents "a far-reaching pronouncement concerning the limits on a court's power to prescribe affirmative action as a remedy for proven violations of Title VII of the Civil Rights Act." For, the Stotts majority grounded the decision, at bottom, on the holding that federal courts are without any authority under Section 706(g) -- the remedial provision of Title VII -- to order a remedy, either by consent decree or after full litigation, that goes beyond "make whole" relief for actual victims of the discrimination. Thus, quotas, goals, or other preferential techniques based on race or gender differences that are by definition victim-blind -- embracing without distinction nonvictims as well as victims of unlawful discrimination -- cannot be a part of Title VII relief ordered in a court case, whether the context is hiring, promotion or layoffs.

Concern for individual rights was at the core of two other Supreme Court decisions last Term that are significant from a civil rights perspective. In both, the Court spoke unanimously and the Department of Justice was on the side of the eventual winner as a friend-of-the-court (or amicus curiae).

In Palmore v. Sidoti, 52 U.S.L.W. 4497 (April 25, 1984), the Court threw out a Florida State court judgment awarding child custody to the father and denying custody to the natural mother because of her subsequent inter-racial marriage. Speaking

with one voice, the Supreme Court rejected the lower court's thesis that private biases -- which might later place the child under considerable social pressures not likely to arise if she lived with her father -- could serve to compromise individual rights. As Chief Justice Burger there emphasized: "The Constitution cannot control such prejudice, but neither can it tolerate it. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."

Reading Stotts and Palmore together leads, almost ineluctably, to the conclusion that individual rights -- that is, the civil rights of each person to be free from unlawful discrimination -- transcend virtually all claims of entitlement raised by a group, or by members of that group. And it matters not any longer -- as some lower courts had suggested -- that the justification for wanting to compromise this principle is bottomed on an "operational needs" rationale -- whether designed to advance or impede some greater social purpose. The simple fact is that no conglomerate interest that is served by a classification on account of race, sex, or any other immutable characteristic, can be allowed to override or undercut the most fundamental of all personal rights: equal opportunity. That is a major lesson of the Supreme Court last Term; it is unquestionably one well worth heeding.

The decision in Hishon v. King & Spaulding, 252 U.S.L.W. 4627 (May 22, 1984), further underscores the point. The Supreme Court ruled in that case that the individual protections promised by Title VII of the Civil Rights Act of 1964 extend to employees of a law partnership with respect to a firm's consideration of partners. Elizabeth Hishon alleged that she was passed over for partnership because of her sex. The Court, in agreement with the Department of Justice, held that law partnerships are within Title VII coverage as to their employment decisions and may not discriminate on the basis of gender against associates entitled to partnership consideration. A young associate's expectation at the time of hire of becoming a partner in a law firm is, the Court held, one of the "terms, conditions, or privileges of employment," within the meaning of Title VII.

As these cases suggest, individual rights are definitely receiving a more sympathetic ear at the Supreme Court. Interestingly, all three cases I have mentioned involved a reversal of the decision below. Some Justices have gone out of their way this summer -- from the podium, not from the bench -- to criticize the past Term as signalling a disturbing retreat from established civil rights values. There is, however, another view, held, I would submit, by Americans in far greater numbers.

That view applauds the Supreme Court's recent decisions reaffirming individual rights as pointing the way toward a renewed consensus in this vital area of law enforcement. Far from signalling a "disturbing retreat," the Court's recent rulings mark a refreshing advance of fundamental principles that have, for too long, been left unattended while lower federal courts limited application of the federal civil rights laws to members of preferred groups, too often sacrificing the ideal of equal opportunity on the altar of equality of results. The message of Stotts particularly, as well as the other cases I have mentioned -- and the Court's civil rights decisions in Arizona Governing Committee v. Norris, 51 U.S.L.W. 5243 (decided June 28, 1983); Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. , 103 S. Ct. 2622 (1983); Connecticut v. Teal, 457 U.S. 440 (1982) in the immediately preceding Terms -- is that civil rights protections belong to all individuals not just to a select few; that discrimination on account of race, sex, religion or ethnic origin, whatever its ugly form and for whatever reason, is to be condemned as an impermissible interference with the personal right to equal opportunity. By returning the focus of inquiry back to individual rights and grounding its decisions on what the Constitution and our federal laws in fact provide -- rather than on expansive notions of what could have been provided had others been involved in the

legislative process -- the Court's majority once again assumed the role assigned by our Constitution to the Judiciary. In the finest tradition, it has returned to the judicial function of interpreting our laws, not striving to remake them, of preserving fundamental values that exist, not trying to reshape them. Our individual freedoms are undoubtedly more secure as a result.

Thank you.